SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 221

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE,

Appellants,

vs.

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

FREDERICK H. WOOD,
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Counsel for Appellees.

THOMAS T. COOKE,
CARSON E. COWHERD,
Of Counsel.

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F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL.,

Appellees.

STATEMENT OF APPELLEES UNDER RULE 12, OPPOSING JURISDICTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM.

I.

Opposition to Jurisdiction and Motion to Dismiss.

Appellants seek to appeal from an order of the statutory court for the Western District of Missouri, dated June 18, 1938, which permitted appellees (commission men at the Kansas City Stockyards) to withdraw from that court some $600,000 impounded by them [1] between June 14, 1933,[2] and

[1] Being the excess of the legally filed rates over the rates fixed by the Secretary of Agriculture in his order held by this Court to be invalid.

[2] The date of the Secretary's order reducing rates, which order was found by this Court to be invalid because a "full, fair and open" hearing had been denied.

November 1, 1937,[3] as a condition of the granting to them of an order temporarily restraining the Secretary of Agriculture from putting into effect reduced commission rates and to await the result of the litigation as to their validity.

The Secretary's order fixing these reduced rates was held to be invalid by this Court in *Morgan* v. *United States*, No. 581, decided April 25, 1938; petition for rehearing denied May 31, 1938. It reversed the decree of the statutory court refusing an injunction and remanded the cause for proceedings in conformity with its opinion.

After finding that irreparable injury would result to the commission men unless the Secretary's order of June 14, 1933, reducing rates, should be temporarily restrained, in that, among other things, unless restrained, the Secretary of Agriculture would

> "proceed in derogation of the right of the petitioner to collect rates and charges for stockyard services rendered under the schedule of rates and charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said order the petitioner would be unable to collect from the users of its services the difference between the rates fixed by the said order of the Secretary and the rates prescribed in the schedule of rates and charges now on file with the Secretary of Agriculture"

and that

> "In the event the relief in said petition prayed was finally granted by this Court, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner,"

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[3] The date when, as a result of an agreement between the Secretary and appellees, new rates were substituted for the rates filed on May 11, 1932, by appellees.

the statutory court granted the temporary restraining order on July 22, 1933 (R. 127-128),[4] before the effective date of the Secretary's order, with the following proviso:

> "Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect *and pending final disposition of this cause*, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner." (Italics ours.)

After this Court held that the Secretary's order of June 14, 1933, reducing rates, was invalid, and issued its mandate reversing the statutory court's decree refusing an injunction, the statutory court denied the Government's motion to stay the distribution of the impounded funds and granted a motion of appellees that they be restored to the possession of appellees.[5]

When the statutory court refused to grant the Government's motion to stay the distribution of the impounded funds, it necessarily became incumbent upon it to grant an order for their restoration to the possession of appellees. Realizing, doubtless, the impossibility of contending that the refusal to grant the stay was an appealable "final order

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[4] This and similar references are to the record filed in this Court in *Morgan* v. *United States*, No. 581, October Term, 1937.

[5] The impounded funds, of course, belonged at all times to the appellees, being merely deposited as security in the event the Secretary's order should be declared to be valid. It having been declared invalid, the only order of court necessary was one permitting the appellees to regain possession of what they already owned.

or decree," the Government appeals only from what it calls the "order of restitution." It is not such, however, because the impounded funds at all times were legally owned by appellees; and upon this Court's declaring that the Secretary's hearing was "fatally defective," and his order invalid, the right to possession of these funds automatically vested in appellees. It would clearly seem that they could have brought mandamus to compel their distribution if an order therefor had been refused. This follows from the express terms of the impounding order set forth above, which clearly contemplated that in the event the Secretary's order should be set aside (as it was), right to the possession of the funds should be vested in appellees.

It would not, however, aid appellants to assume (as would seem to be clearly contrary to fact) that the statutory court's decision to restore the impounded funds to appellees was a matter of discretion. If such a discretionary order is reviewable at all, upon appeal to this Court, it seems clear that the jurisdictional statement in accordance with Rule 12 must include "a showing of the matters in which it is claimed that the court has abused its discretion." The jurisdictional statement filed by appellants makes no such showing, nor do appellants otherwise suggest what the abuse of discretion might be.

Appellants, bold as they are in their claims, would hardly go so far as to assert that appellees may not eventually become entitled to these impounded funds. What they must claim, therefore, is that they cannot, even at the discretion of the Court, be ordered restored to appellees at this time. In other words, their objection to the order of restoration is the same as to the refusal of the Court to grant them a stay. But the refusal of a stay is, of course, concededly discretionary with the Court. Appellants are, therefore, stopped at the threshold, unless they can demonstrate, as they plainly cannot, that they had an absolute legal right to

have the statutory court stay the distribution of these impounded funds until such time as the Secretary of Agriculture, an independent legislative tribunal whose proceedings cannot be controlled by that Court, might succeed in making a valid order.[6] The mere statement of such a proposition is its own refutation.

It appears from the petition for appeal and the jurisdictional statement that it is made "pursuant to Section 316 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168; U. S. C., Title 7, Section 217); the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Title 28, Sections 44 and 47A) and the Act of February 13, 1925 (c. 229, 43 Stat. 938, U. S. C., Title 28, Section 345)." The cases relied on to sustain the jurisdiction of this Court are *B. & O. R. R. Co.* v. *United States*, 279 U. S. 781; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, and the prior decisions of this Court in this case.

Neither the majority nor the dissenting opinion in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, in any way supports the Government's contentions. In that case an order of the Interstate Commerce Commission had required intrastate rates for the transportation of logs, fixed by the Florida Railroad Commission, to be increased because discriminatory against interstate commerce. The statutory court sustained the order of the Interstate Commerce Commission. This Court reversed and held the order invalid on the ground that the Commission had failed to make the

[6] On or about June 2, 1938, the Secretary of Agriculture purported to reopen these proceedings, upon the old findings of fact and without permitting any new evidence, for the sole purpose of "validating" his invalid order of June 14, 1933, *as of that date*. Although the statutory Court in its opinion said that there was not "any shred of reason or law" to support what the Secretary proposed to do, it has no way of instructing him to follow any other course. The only order he proposes to make, therefore, can have no effect upon the right to these impounded funds or even with respect to reparation awards, assuming contrary to fact, that all are not barred.

basic findings necessary to support its ultimate finding of a discrimination against interstate commerce. From the date when the Commission's order was made until a decree was entered upon this Court's reversal, the railroad had collected the higher rates required by the order of the Interstate Commerce Commission. After taking additional evidence and upon the basis of new findings,[7] the Commission made another order which was sustained by this Court. The shippers who had intervened applied to the District Court for an order of restitution. It referred the matter to a master and confirmed his report which found reasonable rates to be intermediate between the Commission's rates and the Florida Railroad Commission's rates, and awarded restitution for about one-third of the excess collections made by the railroad. Upon appeal, a majority of this Court held that the shippers were entitled to no restitution, because it would not offend equity and good conscience for the railroad under the circumstances to retain the moneys collected,[8] while the minority held that the shippers had a legal right to full restitution because the money was collected under an invalid order.

The case is of no assistance to the Government here. The commission men at the stockyards, who are the appellees here, have never collected anything they were not entitled to collect. By virtue of the express provisions of the Act, they were required under pain of civil and criminal penalties to collect the rates filed by them on May 11, 1932, until the Secretary should make a valid order prescribing

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[7] This is precisely what the Secretary proposes not to do in our case.

[8] The opinion expressly states that there was no claim that conditions affecting reasonableness of rates had changed during the litigation (p. 316). This Court can judicially note that they greatly changed during the period 1933-1937, e. g., livestock prices rose.

An important equity also existed in the fact that the Florida state rates were confiscatory.

other rates. He has never made one. Appellees do not need the aid of equity to recover moneys from appellants in a restitution proceeding. The impounded moneys have always belonged to them. The very purpose of the impounding order was, of course, to avoid the necessity of any such proceeding. All that is needed by appellees at the most is an order from the Court, ministerial in character, directing the clerk to permit the withdrawal of the impounded funds. The Secretary's order being invalid and the terms of the impounding order being what they are, the appellants have no concern whatsoever with respect to the making of such an order, which could properly be made *ex parte* without notice to them because it in no way affects their rights.

Nor does the dissenting opinion in any way aid the Government in its contentions. Quite the reverse. Mr. Justice Roberts (with whom the Chief Justice, Mr. Justice Brandeis and Mr. Justice Stone concurred) thought that the railroad was required to make the refunds demanded. The majority opinion was based on the idea that since equitable restitution is a matter of grace, the balance of the equities in the particular situation justified refusal to refund, irrespective of legal rights. The basis of the dissenting opinion, however, is that, since this Court had held the first order of the Commission to be a nullity, it was the same as though it had never been made, and that unless those who had seasonably asserted their rights to refunds were granted such refunds, the Interstate Commerce Commission would have been permitted to unconstitutionally encroach upon the sovereign right of the State of Florida through its Railroad Commission to fix intrastate rates.

The Government, of course, is forced to contend in our case that restitution to the shippers will not be a mere matter of grace but a matter of right, although the impounded moneys were duly collected during a period which

no order of the Secretary can now affect, even if he took new evidence and made new findings, which he is expressly refraining from doing. Its position is, therefore, opposed to both the majority and dissenting opinions in the *Atlantic Coast Line* case.

It is difficult to see wherein appellants can derive any comfort from any of the opinions in the *Morgan* case. They are thus remitted to the *Baltimore & Ohio* case, *supra*, the only other case on which they rely. Nothing in that case aids appellants. As can be seen from the discussion on page 785, the application therein requested an order that one set of railroads make restitution to another set of railroads on account of charges illegally collected. Such an application was truly called "an equity proceeding resulting in a final decree." In our case, however, the statutory Court had no authority to conduct any such equity proceeding because in its final decree it did not reserve any jurisdiction (R. 195). Moreover, the order for the release of the impounded funds is a simple permissive order authorizing the clerk to release them, to which appellants are not parties, not "an equity proceeding resulting in a final decree." Nor did the statutory court, as it did in the *B. & O.* case, refuse "to give effect to" or "misconstrue" the mandate of this Court so that its action might be controlled by this Court "either upon a new appeal or upon writ of mandamus." On the contrary, it acted in strict conformity with the mandate of this Court, just as the lower courts did in *Arkadelphia Milling Co.* v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, and *In the Matter of Lincoln Gas & Electric Co.*, 256 U. S. 512, in which it was necessary to enforce the provisions of appeal bonds.

Although appellants must necessarily claim that a refusal to stay the distribution of the impounded funds was not even within the discretion of the statutory court, they

neither rely upon Section 47 of the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 220; U. S. C., Title 28), nor have they complied with Rule 12, Subdivision 1, of the rules of this Court which requires "a showing of the matters in which it is claimed that the court has abused its discretion." In reality they are appealing from a mere incident of a non-appealable temporary restraining order. Moreover, as we shall show, even assuming that the appeal technically lies, it is utterly without merit.

Reference to Sections 44, 46, 47 and 47A of the Urgent Deficiencies Act discloses that while an appeal is allowed to this Court from an order granting or denying a permanent or an interlocutory injunction, no such appeal is allowed from a mere temporary restraining order. The impounding of the funds in dispute was concededly a mere condition of obtaining a temporary restraining order, which is not appealable. It is thus impossible to contend that when such temporary restraining order has terminated by reason of the fact that a permanent injunction has issued, an order in the nature of a mere direction to the clerk to restore the impounded funds to the custody of their rightful owners is appealable.

It is clear for all of the above reasons that no appeal lies from the order of the statutory court.

II.

Motion to Affirm.

Pursuant to Paragraph 3 of Rule 12 and Paragraph 4 of Rule 7 of the Revised Rules of the Supreme Court of the United States, the appellees move in the alternative to affirm the order of the District Court on the ground that it is manifest that the appeal was taken for delay only, and that the question on which the decision of the cause depends is so insubstantial as not to need further argument.

1. *Prior Proceedings in the Case and History of Appellees' Rates.*

On April 25, 1938, this Court[9] (one Justice dissenting) held that the order of the Secretary of Agriculture, made June 14, 1933, and purporting to fix the commission rates of appellees (hereinafter sometimes called Tariff No. 3), was wholly "invalid" because of the denial of a "full, fair and open hearing." The hearing which was granted was termed "fatally defective." A petition for rehearing was denied by this Court on May 31, 1938.

The appellees had on July 19, 1933, before the effective date of the Secretary's order, brought suit before a statutory Court sitting in the Western District of Missouri, to set the Secretary's order aside (R. 1).[10] On May 11, 1932, they had, in accordance with Section 306 of the Packers and Stockyards Act of August 15, 1921 (c. 64, 42 Stat. 168, U. S. C. Title 7, Section 207), filed with the Secretary of Agriculture a schedule of rates (hereinafter sometimes called Tariff No. 2), and have collected these rates ever since.

As is expressly admitted in the answer of the Secretary of Agriculture to the petition of the market agencies to the statutory court to set aside his order (R. 134-135), these rates were more than 10 per cent lower than the rates fixed by the Secretary of Agriculture to be effective January 1, 1926 (hereinafter sometimes called Tariff No. 1), and which had been continuously in effect up until the filing of the new schedule, Tariff No. 2.

Upon filing their suits to set aside the order of the Secretary of Agriculture, the market agencies obtained from the statutory court, as has been previously noted, a temporary restraining order against the enforcement of the Secre-

[9] No. 581, October Term, 1937; petition for rehearing denied, May 31, 1938.

[10] This and similar references are to the record filed in this Court in *Morgan* v. *United States*, No. 581, October Term, 1937.

tary's order (R. 127). This was continued in force by subsequent orders until the final disposition of the case by this Court (R. 130, 230). It was made a condition of this temporary restraining order that the market agencies should deposit with the Court the difference between the amounts they were collecting under the rates filed by them on May 11, 1932, and the rates fixed by the Secretary in his order of June 14, 1933, which were considerably lower. This impounding continued until November 1, 1937, at which time it ceased by reason of the fact that, as stated to this Court by Government counsel on the argument of the main appeal, new rates were put into effect by the Secretary pursuant to an agreement with the market agencies.

Upon the decision of this Court holding the Secretary's order of June 14, 1933, to be wholly invalid, the contention was made by the Government in the Court below, by means of a motion for a stay, that the impounded funds amounting to approximately $600,000 should not be distributed until the Secretary should have opportunity to "validate" his wholly invalid order of June 14, 1933, *as of that date*. He has never indicated any desire or taken any steps to fix rates for the future. Appellees also moved for an order restoring the impounded funds to their possession. The Court denied the motion for a stay and granted the motion made by appellees for "restitution." Its *per curiam* opinion is submitted herewith. Among other things, it said:

> "We consider that the motion of defendants [11] has not the faintest shadow of merit."
>
> "If this Court did not now order the return to the petitioners [12] of the moneys deposited by them the Court itself would be guilty of bad faith."
>
> "We do not consider that the Secretary's contention that he now can make an order prescribing rates and

[11] The Secretary of Agriculture and the United States.

[12] The appellees.

charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it."

2. *Argument.*

The statute provides (Section 310) that the Secretary of Agriculture may "after a full hearing" upon a complaint or upon his own motion, if he finds that existing rates are unreasonable, prescribe just and reasonable rates "to be thereafter observed." It denies the power (Sections 308 and 309) to make reparation orders, except upon petition of the shipper filed within ninety days after the cause of action has accrued. Whether the cause of action accrues upon the performance of the services for which the commission is charged; that is, the selling of the livestock, or upon payment therefor, makes no difference in this case, because it is not claimed that any reparation petitions have been filed within ninety days of either event in any case. As held in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, the Secretary's order, even if it had been valid, would not have entitled any shipper to reparation. Indeed, the Secretary did not attempt to grant reparation for the period from May 11, 1932, to June 14, 1933, when Tariff No. 2 rates were collected without impounding.

In the face of these statutory provisions, the Secretary proposes to award reparation without the shippers having filed any timely petitions therefor, *and this without taking any testimony as to conditions in the years 1933, 1934, 1935, 1936 and 1937, during which all the transactions, claimed to be the possible subject of reparation, took place.* He proposes to do this by "validating" his wholly invalid rate order of June 14, 1933, which was predicated upon the wholly stale test year 1931. He does not propose to make any rates for the future but only for the period between June 14, 1933,

and November 1, 1937, during which the impounding continued.

Obviously, the Secretary is attempting to award reparation under the guise of "validating" a wholly invalid order, and this entirely upon his own motion, without timely petitions having been filed by the shippers. Even upon his own theory that he is entitled to reopen the proceedings, he was on June 14, 1933, only in the middle of a hearing. And yet he proposes to date his order not as of a date in the future "after a full hearing" has been completed, but as of a date five years ago when the hearing was incomplete. He does not propose to make rates "thereafter to be observed" but only to "validate" his invalid rates because, to his mind,[13] they ought to have been observed during a past period, and this without taking any evidence as to what were reasonable rates during the period. It is entirely plain that he is utterly without power to do what he proposes.

But were the fact otherwise, it would have no bearing upon the merits of this appeal. The Court has no power to hold, without any authorization in the statute, the impounded funds as security, even for reparation claims which might possibly be established, much less in a situation where no reparation claims have been made and none can be made because all are barred by the ninety-day statute of limitations. The Secretary's orders have only *prima facie* effect in connection with reparation, and judgment can only be obtained in the courts. Assuming that valid reparation claims could possibly be brought at this time, which is contrary to the fact, they might well be established in other courts than the District Court for the Western District of

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[13] In denying the Secretary's petition for a rehearing, this Court said:

"From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below."

Missouri, and could not be established at all in the statutory court which holds the impounded funds but only before ordinary courts and juries. Do appellants contend that these funds can be transferred between courts without statutory authority? It is plain that there is not an iota of sense in the contentions made by appellants, and that the Government's argument below, which doubtless will be repeated here, rests entirely upon a long series of palpable fallacies. Among these are the following:

> 1. That the excess of the proceeds of legally filed rates, over and above wholly invalid rates fixed by the Secretary, cannot be finally and definitively collected until the reasonableness of the filed rates, which must be collected under pain of civil and criminal penalties (Sec. 306), has been adjudicated by an administrative tribunal or court.

This is plainly untrue, first, because if, as is the fact here, the rates are lower than effective maximum rates duly established by the rate-making agency,[14] they are lawful rates as well as legal rates, and never can be the subject of reparation proceedings. *Arizona Grocery Company* v. *Atchison, etc., R. R.*, 284 U. S. 370. Secondly, it is untrue because the right to reparation is lost by failure to file a claim within the statutory period of limitations, in this case ninety days, no matter how unreasonable the legally filed rates may be considered by the Secretary. *Phillips* v. *Grand Trunk Ry., supra.*

> 2. That the statutory court, which is a judicial body, has any control over or concern with what the Secretary of Agriculture, who is an agent of the legislature

[14] Tariff No. 1, established by the Secretary of Agriculture effective January 1, 1926, and never attempted to be altered by any subsequent order, except the wholly invalid order of June 14, 1933.

for rate-fixing purposes, does in the future with respect to making an order, until its jurisdiction is regularly invoked by proceedings to enforce or set aside.

Assuming, therefore, contrary to fact, that the Secretary of Agriculture has the power to make the retroactive order he proposes, and that he should make the same order which he pretended to make on June 14, 1933, this nevertheless would be no reason at all for the Court to delay or bar the return of the impounded funds to the market agencies. *A fortiori*, if there is no "shred of law or reason" in what the Secretary proposes to do, is it not ridiculous to contend that a Court, which has no power to stop him, or direct him aright, must stay its hand while he proceeds in direct violation of the statute?

3. That the Secretary of Agriculture is not required in good faith to hear and consider the arguments of the market agencies, but may set out to "validate" his wholly invalid order of June 14, 1933, after a perfunctory hearing.

This is the necessary implication of a proposal to "validate" as of June 14, 1933, because it is obvious that unless the terms of the new order should be precisely the same as those of the wholly invalid order of June 14, 1933, it could not, assuming all of the Secretary's arguments are sound, possibly be dated as of that date.

4. That in determining the validity of the existing rates which appellees filed under the Act, the substantive provisions of the Act can be separated from the procedural provisions.

While rates "to be thereafter observed" can always be made at any time "after a full hearing," the rates duly

filed with the Secretary of Agriculture by the market agencies are legal and conclusively presumed to be reasonable in so far as reparation is concerned as against any shipper who has not within ninety days after he paid for the services filed a claim for reparation; and if, as is the case of the rates in question, they are lower than maximum rates previously authorized by the Secretary, they are conclusively presumed to be valid even if timely petitions for reparation are filed. *Arizona Grocery* case, *supra*.

5. That the impounded funds can be considered in some way as being security for reparation claims, even if such timely claims could now be made, the fact being that none can now be made because over six months have elapsed since the impounding ceased.

Reparation claims are tort claims for damages. It is absurd to contend that they are secured by the impounded funds.

6. That upon the termination of the temporary restraining order (as a condition of obtaining which the provision for impounding was made), the market agencies did not automatically become entitled to an order permitting them to withdraw these funds, the Secretary's order being invalid.

7. That it was the absolute right of appellants to have a stay of distribution from the statutory court, and was not even discretionary with the statutory court to refuse to stay the distribution of the impounded funds.

8. That the findings of the statutory court (now set aside by this Court) with respect to the rates fixed by the Secretary's subordinates not being unreasonable now have or ever had any bearing whatsoever upon the

reasonableness or unreasonableness of the rates filed by the market agencies as Tariff No. 2.

All the statutory court was empowered to do, in any event, was to determine whether the Secretary's pretended order fixing "reasonable rates" was supported by some evidence. Since the Secretary's order was wholly invalid for other reasons, it was not even empowered to do that.

9. That even if the Secretary's order had been upheld by this Court as valid, any reparation could have been ordered by him in the absence of timely petitions therefor filed by the shippers. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662.

10. That the pendency of the litigation over the Secretary's order of June 14, 1933, in any way prevented the filing of reparation claims with the Secretary or action thereon by the Secretary.

Of course, the Secretary, if he had accorded "full, fair and open" hearings, could have awarded reparation to shippers who filed petitions therefor, and the shippers would not have had to put their sole reliance upon the return of the impounded funds as the result of their possible expectation that the Secretary's order would be held valid. Plainly the Act intended to discourage reparation claims by providing for a short statute of limitations and for individual action. Since a reparation order of the Secretary is only *prima facie* evidence in the courts (Sec. 309f), it is obvious that some reparation claimants may win and some may lose on the same state of facts. This is the result intended by the statute, and the Secretary's argument that it is unjust should be addressed to the Congress and not to this Court.

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11. That the result of reparation proceedings would necessarily have been the same as if the Secretary's order made upon his own motion had been valid and had thus resulted in refunds to the shippers from the impounded funds.

Obviously, for the reasons just stated, the results might be very different; and again the argument as to unfairness should be directed to the Congress and not to this Court.

12. That without being in a position to fix any rate for the future, which could apply to this case, the Secretary can, by "validating" his wholly invalid order of June 14, 1933, as the "public representative" of the shippers, award reparation in the absence of timely complaints from shippers, and without taking any evidence as to the situation in the years 1933-1937, during which all the transactions by reason of which reparation might have been claimed if the rates were unreasonable, took place. *Phillips* v. *Grand Trunk Ry., supra.*

13. That any shipper, under any circumstances, now that the Secretary's order of June 14, 1933, has been declared invalid, can have any claim against the impounded funds.

14. That the date June 14, 1933, has any such special significance that a new order made by the Secretary could be dated as of this date.

It is merely the date when the Secretary signed a piece of paper, and has no more significance than the date of his original order of inquiry, the date of his order for a rehearing, or the date of his attempted reopening of the proceedings before him. At the most it is merely a date

in the middle of the administrative proceedings when nothing valid or definitive had taken place.

Prayer for Dismissal or Affirmance.

It is, therefore, respectfully submitted that for the reasons previously stated the appeal should be dismissed or the decree of the District Court should be affirmed.

Respectfully submitted,

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Of Counsel.

Dated, July 12, 1938.

EXHIBIT "A."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

In Equity.

No. 2328 and Related Cases Nos. 2329-78.

F. O. MORGAN, Doing Business as F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL., *Petitioners,*

vs.

THE UNITED STATES OF AMERICA and the SECRETARY OF AGRICULTURE, *Defendants.*

Before VAN VALKENBURGH, Circuit Judge and REEVES and OTIS, District Judges.

Per CURIAM:

The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution. These matters arise in the manner now to be stated.

Under date of June 14, 1933, the Secretary of Agriculture issued an order fixing maximum rates and charges for stockyard services rendered by petitioners at the Kansas City Stockyards in Kansas City, Missouri. By bills filed July 19, 1933, petitioners sought injunctive relief against enforcement of that order. This Court (July 22, 1933) temporarily restrained its enforcement upon the following condition imposed in each of the companion cases—

> that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the

amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

By agreement of counsel the temporary restraining orders, so conditioned, were continued in effect pending final hearing. Decrees dismissing the bills were entered December 20, 1934. (See this case, 8 F. Supp. 766). Petitioners appealed. The Supreme Court on May 25, 1936, reversed the decrees and remanded the cases for a determination of the question whether the Secretary had accorded petitioners "a full hearing" as required by law. 298 U. S. 468. After the remand and a presentation anew of all issues, this court held that petitioners had been accorded the hearing required by law and again entered decrees dismissing the bills (July 9, 1937). Petitioners again appealed. The Supreme Court on April 25, 1938 (— U. S. —) reversed outright the decrees of this Court, on the ground that the Secretary had not accorded the petitioners the "full hearing" required by law. On May 31, 1938, a petition for rehearing was denied and the cases remanded for further proceedings in accordance with the opinion of the Supreme Court. Pursuant to the mandate of the Supreme Court this Court now has entered its final decrees setting aside the decrees of July 9, 1937, and permanently enjoining the enforcement of the Secretary's order of June 14, 1933.

The Clerk of this Court has in his custody sums aggregating $586,093.32 paid to him by petitioners in accordance with the condition upon which restraining orders were issued, as above set out. Petitioners ask that the sums so deposited be returned to them. Defendants move that the distribution of the moneys be stayed until the termination of such litigation, if any, as shall follow an order the Secretary may make hereafter, after he has accorded petitioners such a hearing as is required by law (which now he offers to do), in which order he will prescribe the maximum rates and charges for stockyard services rendered by petitioners,

the order to be retroactively effective as of and from June 14, 1933.

1. We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has enjoined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined.

2. We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to prescribe shall be determined and prescribed "after full hearing" (and there has been no such hearing), and that when they have been so determined and prescribed they shall "be *thereafter* observed."

Defendants' Motion for an Order Staying Distribution of Impounded Moneys is overruled. It is so ordered. An exception is allowed to defendants.

The motion (styled petition) of petitioners (styled plaintiffs) for an Order of Distribution is sustained in an order filed contemporaneously herewith. To that order defendants are allowed an exception.

____ ____,
United States Circuit Judge.

____ ____,
United States District Judge.

____ ____,
United States District Judge.

(6782)